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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ADAM JAY STONE, Defendant and Appellant.	G056524 (Super. Ct. No. 15NF0081) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Sheila F. Hanson, Judge. Affirmed.

Brett Harding Duxbury, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler and Julie L. Garland, Assistant Attorneys General, Paige B. Hazard and Steve Oetting, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted Adam Stone of first degree murder, and found true the allegation he discharged a gun causing death. The trial court sentenced Stone to 25 years to life on the murder plus 25 years to life on the gun use enhancement.

Stone contends "[p]rinciples of federal due process and retroactivity require that [he] be afforded the opportunity to qualify for [a mental disorder] diversion" under Assembly Bill No. 1910 (Assem. Bill No. 1910) (Pen. Code, § 1001.36, subd. (a); all further statutory references are to the Penal Code unless otherwise stated). We conclude Stone is not entitled to diversion because he is statutorily ineligible.

Stone also contends the trial court improperly instructed the jury with CALCRIM No. 3428 because the instruction precluded the jurors from considering Stone's purported mental disorder in their evaluation of his imperfect self-defense claim. We conclude the instruction did not preclude the jurors from considering Stone's mental illness and in any event, any instructional error was harmless.

Finally, Stone contends the trial court abused its discretion in declining to strike his gun use enhancement. We find no abuse of discretion because the trial court properly found no mitigating factors and sufficient aggravating factors. Accordingly, we affirm the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND

On January 7, 2015, at around 4:45 p.m., Stone shot and killed Alexander M. The prosecutor argued Stone murdered Alexander in retaliation for a prior altercation. Defense counsel argued Stone lacked the intent to kill or acted in self-defense.[1]

[1] Because the parties do not dispute the identity of the shooter (Stone) and the victim (Alexander), for clarity we substitute their names in our summary of the trial testimony where applicable.

A. *Prosecution Case*

Vaun Cummins testified that on January 7, 2015, at around 4:45 p.m., he observed a red BMW back into a parking spot at Twila Reid Park. While the engine was still running, Stone stepped out of the passenger side, walked up a knoll, pulled out a handgun and fired two shots at Alexander, who was sitting down and looking the other way. Stone hurried back to the BMW and left the area. Cummins did not hear Alexander say anything before Stone shot him. When Cummins went to check on Alexander, he did not see any weapons on or near Alexander.

Scott Lane testified he was walking toward his van when he heard the gunfire in the park. He turned around to see Stone running toward the parked red BMW. Lane did not hear any argument or yelling before hearing the gunshots.

Maureen Reinhart saw a red car drive quickly into the parking lot and "just stop." Stone got out and ran towards Alexander before firing two shots. Reinhart did not hear Stone or Alexander say anything. When Reinhart went to check on Alexander, she did not see any gun or weapon on his person.

Anaheim Police Officer Kevin Flanagan testified that on January 7, 2015, at around 4:50 p.m., he responded to a report of a shooting at Twila Reid Park. When Flanagan arrived he observed Alexander on the ground, bleeding from a gunshot wound on the right side of his head. Flanagan did not see any weapon.

Tyronne Walker testified that on January 6, 2015, he, Stone and Alexander were smoking marijuana at Twila Reid Park. There was no disagreement between Stone and Alexander. The next morning, Walker and Stone were smoking marijuana when Alexander asked Stone for some marijuana. After Stone gave Alexander some, Alexander said he would pay for it "later or you can fight me for it." After Alexander left, Stone was angry and said, "That's messed up," and, "You don't do people like that."

Ransom Cook testified he was a "casual" friend of Stone. On the afternoon of January 7, 2015, Stone and Cook were socializing at Cook's home when Stone asked

for a ride home. While Cook was driving Stone home in Cook's red BMW, Stone directed him to go into Twila Reid Park so Stone could "see his friends."

After Cook parked the BMW, Stone quickly exited the vehicle. Shortly afterward, Cook heard two gunshots. While Cook was still in shock from hearing the gunshots, Stone returned and said, "Drive." As Cook drove away, he saw Stone holding a gun and observed a gun case on the BMW's floorboard. Cook asked what happened. Stone said he had been "punked" and "ripped off" so he "took care of it" and "shot him." Stone said he needed to get rid of the gun, so Cook drove to a mutual friend's home and gave his friend the gun and gun case.[2]

After Cook drove home, Stone left on his skateboard. Shortly thereafter, the police arrested Cook placed him in the same jail cell as Stone. Stone told Cook he had thrown his clothes away and dumped two expended casings into a gutter. Stone also explained why he had shot Alexander, stating Alexander "tried to hurt me," "would have fuckin' punked on me" and "was coming after me." Stone never told Cook Alexander had a weapon or was going to shoot him.

Cook also overheard Stone telling his mother and grandmother he was in custody on a case of mistaken identity. When apprehended for the shooting, Stone told the police officer he had been at school earlier that afternoon.

B. *Defense case*

The defense presented evidence of Alexander's reputation for violence. Ronald Baker testified Alexander once stole his friend's cellphone. When Baker and his friend confronted Alexander about the theft, Alexander tried to extort $100. When they could not produce the money, Alexander grabbed Baker's laptop and said, "I'm keeping this until I get the money [for the phone]. Don't try to stop me or I'll kick your ass."

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[2] Cook pleaded guilty as an accessory.

Baker took the threat seriously because Alexander had a reputation for violence and he had witnessed Alexander hitting a security guard.

Kailey O'Dell testified Alexander once stole her money and jewelry. When O'Dell confronted Alexander, he said he needed the money and displayed a gun.

Gary Snopel said Alexander had a "Jekyll-and-Hyde" personality. Snopel saw Alexander hit his girlfriend two or three times, hit random persons in the streets four or five times, knock a person out, grab a girl by the neck, and display a gun several times.

The defense also presented evidence Stone suffers from posttraumatic stress disorder (PTSD) from his military service in Iraq. Psychologist Lisa Grajewski testified PTSD is a psychological disorder that can develop after exposure to trauma. The symptoms of PTSD include avoidance of triggers that remind a person of the trauma and hypervigilance, which Grajewski explained is an inappropriately elevated evaluation of the environment for traumatic threats. Another symptom is hyperarousal, which describes the body's reaction to chronic hypervigilance. Hyperarousal results in the release of hormones and chemicals that "mess up your thinking in a lot of ways." PTSD may produce physical changes to the brain that heighten the fight or flight response and may cause the person to act more emotionally and less rationally.

Stone's father testified when Stone was a child, he was "real easygoing, [and] non-confrontational." In high school, Stone began smoking marijuana and was easygoing and unmotivated. But after enlisting in the Army and serving two tours of duty in Iraq, Stone became distant, reclusive and easily agitated.

Stone's stepfather testified he enjoyed being around Stone before he joined the army. When Stone returned home, he was withdrawn and sullen. The biggest change in Stone was his resorting to violence when irritated. For example, he knocked out a friend who would not stop talking, and "explode[d]" when his mother hid his firearm.

One of Stone's commanding officers in Iraq testified Stone was friendly and outgoing when they first met in 2006. Over the course of their two tours, Stone

became withdrawn and aggressive. Stone's commanding officer also testified no place in Iraq was safe, whether on base or off base. Soldiers were constantly in "Iraq mode," hypervigilant to deal with threats at all times.

Two fellow soldiers agreed that Stone's personality changed dramatically over the course of his tours: from relaxed and funny to disengaged and withdrawn.

Pyschologist Rahn Minagawa testified he interviewed Stone while charges were pending for the Alexander shooting, and diagnosed Stone with complex PTSD and other related disorders resulting from his repeated exposure to trauma while serving in Iraq. Minagawa opined that Stone's mental condition could explain his behavior in this case.

Stone testified in his defense. During his Iraq tours, he faced danger on a daily basis and observed numerous deaths and violence. As a result, Stone had nightmares and began drinking alcohol and smoking marijuana to fall asleep. When Stone returned home, he was uneasy in crowds and found himself constantly scanning for threats. He also became more prone to violence.

According to Stone, he first met Alexander the day before the shooting. Stone was smoking marijuana with Walker in Twila Reid Park when Alexander approached and asked for some marijuana. After smoking some marijuana, Alexander said, "This is some good weed," and asked to see Stone's stash. When Stone showed him a baggie, Alexander took it and said, "This is my weed now. Every time I see you, you better have weed."

The following day, Stone was smoking marijuana at the park when Alexander approached and asked for "my" weed. When Stone replied he did not have it, Alexander lifted his shirt to reveal a gun in his waistband and said, "Next time I see you, I'm going to fuck you up." Stone understood Alexander was saying he would shoot him.

Stone took a bus to Cook's house and retrieved a handgun he had given Cook. According to Stone, he decided to confront Alexander verbally, with the gun as

backup, and "tell him to leave me alone to try to prevent any further violence against me or my family." When Stone returned to the park, he put the gun in his jacket pocket and walked over to Alexander, who was sitting on a low wall. Alexander gave a "mad dog" stare and began to get up and reach into his waistband. Stone "just reacted," and shot Alexander twice. After shooting Alexander, Stone panicked and ran to Cook's car. He tried to get rid of the jacket and the casings to avoid police detection. When he was arrested Stone told a police officer he had been at school the day of the shooting because it was true he had been at school earlier that day.

C. *Verdict and Sentence*

A jury convicted Stone of first degree murder (§ 187, subd. (a)), and determined he personally discharged a firearm to commit the killing (§ 12022.53, subd. (d)). The trial court sentenced Stone to a total term of 50 years to life, consisting of 25 years to life for the murder and a consecutive 25-years-to-life term for the firearm enhancement.

II

DISCUSSION

A. *Pre-trial Mental Health Diversion Program*

In June 2018, the Legislature created a pretrial diversion program for defendants with certain diagnosed mental disorders, including PTSD. (§ 1001.36, subd. (a); *People v. Frahs* (2018) 27 Cal.App.5th 784 (*Frahs*), review granted Dec. 27, 2018, S252220.) In *Frahs*, we determined the mental health diversion program under section 1001.36 constitutes an ameliorative law because "for a defendant with a diagnosed mental disorder, it is unquestionably an 'ameliorating benefit' to have the opportunity for diversion—and ultimately a possible dismissal—under section 1001.36." (*Id.* at p. 791.) We concluded the provisions of section 1001.36 apply retroactively to all cases not yet final on appeal. (*Ibid*.) For the first time, Stone contends he is entitled to the benefits of the mental health diversion program.

Even though this court has concluded the provisions of section 1001.36 are retroactive, we cannot grant the relief Stone requests. As amended on September 30, 2018, a defendant may not be placed into a diversion program if he is charged with murder or voluntary manslaughter. (§ 1001.36, subd. (b)(2)(A).) Stone was charged with murder and therefore is statutorily ineligible for diversion.

Stone contends the amendment precluding persons charged with murder from diversion should not be applied retroactively because it is not an ameliorative amendment. He cites no authority for the proposition we can selectively apply earlier versions of the same statute. In any event, when considered as a whole, the amended statute is an ameliorative statute because it still provides an opportunity for certain criminal defendants to have the opportunity for diversion and possible dismissal of the criminal case. In addition, application of the amended statute does not violate the constitution prohibition against ex post facto laws because both the original and the amended statutes were enacted and became effective after Stone committed the murder. In sum, we reject Stone's claim he is entitled to mental health diversion.

B. *Jury Instructions*

At trial, the judge instructed the jury on voluntary manslaughter with CALCRIM No. 571, which provides:

"The defendant acted in imperfect self-defense or imperfect defense of another if:

1. The defendant actually believed that he or someone else was in imminent danger of being killed or suffering great bodily injury; . . .

2. The defendant actually believed that the immediate use of deadly force was necessary to defend against the danger; but

3. At least one of those beliefs was unreasonable."

The court also instructed the jury with CALCRIM No. 3428, which provides: "You have heard evidence that the defendant may have suffered from a mental

disorder. You may consider this evidence only for the limited purpose of deciding whether, at the time of the charged crime, the defendant acted with the intent or mental state required for that crime."

Stone contends CALCRIM No. 3428 precluded the jurors from considering his PTSD in evaluating his imperfect self-defense theory and therefore violated his constitutional rights to due process and to present a defense. We disagree. As an initial matter, we conclude Stone has forfeited this instructional error claim on appeal because he failed to object to the wording of the mental impairment instruction at trial. (*People v. Welch* (1999) 20 Cal.4th 701, 757.) Nevertheless, we will review the merits of Stone's argument to forestall an ineffective assistance of counsel claim. (*People v. Williams* (2000) 78 Cal.App.4th 1118, 1126.)

CALCRIM No. 3428 informs the jurors they could consider evidence of Stone's mental impairment for the "purpose of deciding whether, at the time of the *charged crime*, the defendant acted with the intent or mental state required for *that crime*." (CALCRIM No. 3428, italics added.) The charged crime was murder. There was no language that precluded the jury from applying the mental impairment instruction to the lesser included crimes of voluntary manslaughter based on imperfect self-defense.

Moreover, the trial court gave CALCRIM No. 571, which instructed the jury they could find Stone acted in imperfect or unreasonable self-defense if he "*actually believed* that he was in imminent danger of being killed or suffering great bodily injury" and he "*actually believed* that the immediate use of deadly force was necessary," but his beliefs were objectively "*unreasonable*." (CALCRIM No. 571, italics added.) Again, there was nothing in the mental impairment instruction that prohibited the jury from considering Stone's PTSD as it related to his beliefs.

We presume the jury understood and correlated the court's instructions. When considered together, the instructions properly told the jurors that if they found that Stone actually believed Alexander had a gun and he was in imminent danger, and Stone's

state of mind was affected by his mental impairments, but his belief was unreasonable, then they could find him guilty of the lesser included offense of voluntary manslaughter under a theory of imperfect self-defense.

In any event, any instructional error was harmless. (See *People v. Ocegueda* (2016) 247 Cal.App.4th 1393, 1410 [erroneous CALCRIM No. 3428 instruction reviewed for prejudice under harmless error standard of *People v. Watson* (1956) 46 Cal.2d 818.]) In convicting Stone of deliberate and premeditated first degree murder, the jury necessarily determined Stone did not act in self-defense, whether perfect or imperfect. (*People v. Lewis* (2001) 25 Cal.4th 610, 646, ["Error in failing to instruct the jury on a lesser included offense is harmless when the jury necessarily decides the factual questions posed by the omitted instructions adversely to defendant under other properly given instructions."].) Thus, even if we assume the jury interpreted CALCRIM No. 3428 as Stone theorizes, it is not reasonably probable the jury would have reached an outcome more favorable to him.

C. *Firearm Use Enhancement*

The jury found true the allegation that Stone personally discharged a firearm causing death in violation of section 12022.53. Defense counsel requested the trial court exercise its discretion to strike the gun enhancement under section 12022.53, subdivision (h), but the court declined. It explained:

"As to the enhancement that is alleged under Penal Code section 12022.53(d), I have given great consideration to the defense request that I strike that punishment. I do have the authority under law to do so but when I consider all the facts of this case, including your service in the army, your tours of duty, your diagnosis of PTSD, I do not find there are any circumstances in mitigation such as those set forth in California Rules of Court 4.423.

"I do find that there are circumstances [in] aggravation under Rule of Court 4.421, namely . . . the manner in which this crime was carried indicates planning. You

left the scene of your conflict with [Alexander], you left, you armed yourself, you obtained transportation to return to the scene, you committed the murder in a manner which you could escape quickly.

"And so when I consider all those items, including the fact that you engaged in violent conduct, [which] indicates a serious danger to society, I do not believe it would be in the interest of justice to strike this enhancement."

Stone contends the sentencing court erred in declining to strike the gun use enhancement because it made and relied on findings not supported by substantial evidence. Specifically, Stone contends the trial court abused its discretion in finding no mitigating factors despite the probation report noting a circumstance in mitigation, namely, that the victim was an initiator or aggressor or provoker of the incident. The court, however, expressly rejected the probation report's finding. Rather, based on its credibility determination of Stone's trial testimony, the court found Alexander was not the initiator or aggressor. The court further stated that even if it accepted the mitigating circumstance as true, after weighing all of the other circumstances, the court still would conclude it was not in the interest of justice to strike the enhancement.

Stone also faults the court's findings of aggravating factors. (*People v. Black* (2007) 41 Cal.4th 799, 817 ["An aggravating circumstance is a fact that makes the offense 'distinctively worse than the ordinary.'"].) The trial court found as an aggravating circumstance Stone's crime involved great violence. Stone argues "[n]othing in the record indicates [his] offense was more violent than a typical murder." But violence is not an element of murder and thus the trial court was entitled to consider that circumstance in aggravation. (*People v. Dixie* (1979) 98 Cal.App.3d 852, 856.) Stone further argues the finding of planning is already incorporated into the jury's finding of first degree murder. We need not resolve this claim because any impermissible dual use of the planning factor is harmless. When imposing an upper term, a single valid factor in aggravation is sufficient to justify the imposition of the upper term. (*People v.*

Castellano (1983) 140 Cal.App.3d 608, 615.) Similarly, there is no abuse of discretion in declining to strike an enhancement based on a single valid factor in aggravation. Here, the trial court found the crime was particularly violent and involved the use of a firearm. Substantial evidence supported those findings and therefore provide a sufficient rationale for the trial court's sentencing decision. In sum, we discern no error in the trial court's exercise of its discretion under section 12022.53, subdivision (h).

III

DISPOSITION

The judgment is affirmed.

ARONSON, ACTING P. J.

WE CONCUR:

FYBEL, J.

THOMPSON, J.